

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN L. FAGER, et al.,

Plaintiffs,

v.

OLYMPIC PENINSULA NARCOTICS
ENFORCEMENT TEAM, et al.,

Defendants.

CASE NO. C14-5940 RJB

ORDER GRANTING
DEFENDANTS' MOTIONS TO
DISMISS

The Plaintiffs bring this action against a host of defendants based on events surrounding the search, seizure, arrest and prosecution of the Plaintiffs (except Plaintiff Ted DeBray) and the termination of Plaintiff DeBray's employment. This matter comes before the Court on the Defendants' motions to dismiss Plaintiffs' federal claims pursuant to Fed. R. Civ. P. 12(b)(6). Dkts. 13, 14, 16, and 18. The Court has considered the pleadings in support of and in opposition to the motions and the record herein.

Introduction and Background

On December 1, 2014, the Plaintiffs Steven L. Fager, Timothy J. Fager, Cynthia A. Fager, Kathleen J. Wheller, Gary L. Corman, and Ted DeBray filed the instant Complaint for Violation of Civil Rights and Personal Injury. Dkt. 1. The Complaint alleges the following salient facts:

On October 15, 2008, Defendants Grall, Kovatch, Apeland and Vorhies assisted DEA Agent Dan Mancano while, without a warrant, he attached a real time global positioning tracker on Plaintiff Gary Corman's car. On October 29, 2008, Defendants Grall, Kovatch, Apeland and Vorhies executed a thermal search warrant at Corman's home. *Id.* at 9. On October 31, 2008, Olympic Peninsula Narcotics Enforcement Team (OPNET) detectives searched Corman's home. Through the use of the positioning tracker, Corman was arrested by the City of Sequim Police Department. On October 31, 2008, Plaintiff Corman was charged with manufacturing marijuana, booked into Jefferson County Jail, and subsequently released on his own recognizance. On December 8, 2008, Plaintiff Jefferson County Deputy Prosecuting Attorney DeBray (DeBray) was ordered by Defendant County Prosecuting Attorney Dalzell to drop the criminal charges against Corman without prejudice. On July 13, 2009, Defendant Dalzell instructed DeBray to re-file criminal charges against Corman. DeBray did so. On August 31, 2009, the charges against Corman were again dropped. The civil forfeiture claim remained pending until August 24, 2014. Dkt. 1 at 8-11.

OPNET initiated an investigation of criminal activity involving Steven and Timothy Fager in February 2008. Dkt. 1 at 8. In September 2008, Defendants Grall and Vorhies used a thermal imager without a warrant on Plaintiff Steven Fager's home. *Id.* On September 24, 2009, Defendants, Kovatch, Grall, Vorhies, Waterhouse and Apeland executed a thermal search

1 warrant on a building owned by Plaintiffs Steven and Timothy Fager located at 115 Freeman
2 Lane Port Townsend Washington. Dkt. 1 at 11. On October 8, 2009, Defendants Grall, Vorhies,
3 Waterhouse and Apeland executed a search warrant on the building located at 115 Freeman
4 Lane. On October 9, 2009, Defendants OPNET, Benedict, Clallam County Sheriff's
5 Department, and Clallam County filed notice of forfeiture in Jefferson County Superior Court for
6 the real property and building located at 115 Freeman Lane and owned by Steven and Timothy
7 Fager. On October 9, 2009, OPNET filed notice of administrative forfeiture for all of the
8 personal property seized from Plaintiffs Timothy and Steven Fager from 115 Freeman Lane.
9 Dkt. 1 at 11-12

10 On October 8, 2009, Defendants Vorhies and Viada executed a search warrant at the
11 home of Steven Fager, located at 11 Glendale Drive, Sequim, Washington. Steven Fager was
12 arrested and spent one day and night in the Jefferson County Jail. He was released on his own
13 recognizance only to be taken into custody again by a Clallam County where he remained
14 incarcerated for three days. Steven Fager's car, computers, business and personal files and
15 possessions, including a rare coin collection and moneys were seized. On October 9, 2009,
16 Defendants OPNET, Benedict, Clallam County Sheriff's Department, and Clallam County filed
17 notice of forfeiture for all of the personal property seized from Steven Fager's home at 11
18 Glendale Drive. Dkt, 1 at 11-12.

19 On October 8, 2009, Defendant Apeland executed a search warrant at the home of
20 Plaintiffs Timothy and Cynthia Fager, 91 Blaze Trail, Port Townsend Washington. Timothy
21 Fager was arrested and spent one day and night in the Jefferson County Jail before being released
22 on his own recognizance. His truck, business tools, computers, business and personal files,
23 moneys, and many other personal items were seized. On October 9, 2009, Defendants OPNET,
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1 Benedict, Clallam County Sheriff's Department, and Clallam County filed notice of
2 administrative forfeiture for all of the personal property seized from Plaintiffs Timothy and
3 Cynthia Fager's home. Dkt. 1 at 12-13.

4 On October 9, 2009, at 5:55pm Defendants Grall, Vorhies, Apeland and Waterhouse
5 executed a search warrant at Plaintiff Wheller's home, located at 2449 Port Williams Road,
6 Sequim, Washington. On October 20, 2009, OPNET filed notice of administrative forfeiture for
7 all of the personal property seized from Plaintiff Wheller's home. Dkt. 1 at 12-13.

8 In January of 2010, Steven and Timothy Fager signed an agreement staying civil
9 forfeiture actions until the criminal case against them concluded. Plaintiff Wheller also agreed
10 to, and signed, an agreement staying civil forfeiture actions involving her until the criminal case
11 against Plaintiffs Steven and Timothy Fager concluded. Dkt. 1 at 13.

12 The Complaint further alleges that on November 24, 2008, a Formal Complaint was filed
13 by a Clallam County Sheriff's Detective, who detailed misconduct by his fellow OPNET
14 Detectives; i.e. Defendants Grall, Vorhies, and Kovatch. Dkt. 1 at 9. This Formal Complaint
15 triggered an internal investigation into wrongdoing and illegal activity within OPNET. *Id.* Two
16 agencies carried out investigations: (1) the Washington State Patrol and (2) Pierce County
17 Sheriff's Office. *Id.* In June of 2009, Plaintiff Deputy Prosecutor DeBray was informed that all
18 allegations against OPNET were cleared, no wrongdoing was found. *Id.* at 10. DeBray's
19 request for a copy of the report was denied. *Id.* On August 21, 2009, Jefferson County Superior
20 Court granted Plaintiff Corman's motion to compel discovery that included the Investigative
21 Reports into OPNET. *Id.* DeBray filed a motion for an in-camera review of the Investigative
22 Reports to be viewed on September 1, 2009. *Id.* at 11. On August 31, 2009, Plaintiff DeBray
23 was instructed by Defendant Prosecuting Attorney Dalzell that if he did not resign then he would
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1 be fired. DeBray resigned. *Id.* The Complaint alleges that the criminal charges against Corman
2 were dropped rather than allowing any in-camera inspection of the Investigative Reports. *Id.*

3 In October of 2011, the WSP Investigative Report into OPNET was released to the
4 Plaintiffs Steven and Timothy Fager as well as Plaintiff Corman. Dkt. 1 at 13.

5 On November 14, 2011, Plaintiffs Steven and Timothy Fager filed with the Jefferson
6 County Superior Court a Motion to Suppress. *Id.* The Motion referenced the Investigative
7 Report and contains allegations nearly identical to those asserted in the instant Complaint.
8 Compare Dkts. 1 and 15-1

9 On January 9, 2013, Jefferson County Superior Court Judge Craddock Verser ruled that
10 Defendants Grall, Kovatch, Apeland, Waterhouse, and Vorhies acted with a “reckless disregard
11 for the truth” and suppressed all evidence obtained from the thermal and entry searches at 115
12 Freeman Lane. Judge Verser also ruled the case was mismanaged to the level of governmental
13 misconduct, evidence was destroyed while in police custody, and that OPNET Detectives
14 trespassed on the Fager’s property. Dkt.1 at 14. On January 13, 2013, all charges against the
15 Steven and Timothy Fager were dismissed in Jefferson County without prejudice. *Id.* On
16 January 30, 2013 the State filed notice of appeal. *Id.* On March 7, 2013, all charges in Clallam
17 County were dismissed against Plaintiff Steven Fager with prejudice. *Id.*

18 On December 1, 2014, the Plaintiffs filed the instant civil action asserting common law
19 tort causes of action, statutory causes of action, and offenses committed under color of law
20 resulting in a deprivation of rights secured by the Constitution and laws of the United States of
21 America and the Washington State Constitution and laws of the State of Washington. Dkt. 1 at
22 2. The Defendants move for dismissal of the federal causes of action on the basis that they are
23 barred by the applicable statute of limitations, fail to state a claim for relief, and/or are not ripe.

Defendants request that the Court also decline pendent jurisdiction over the remaining state law claims. Dkts. 13, 14, 16, and 18.

Fed. R. Civ. P. 12(b)(6) Standard

A Rule 12(b)(6) dismissal may be based on either a “lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008). In other words, the plaintiff’s complaint must provide a “short and plain statement of the claim showing that plaintiff is entitled to relief. *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Iqbal*, 556 U.S. at 678; *Papasan v. Allain*, 478 U.S. 265, 286 (1986). The pleading standard of Fed. R. Civ. P. 8 “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678.

In analyzing a pleading, the Court sets conclusory factual allegations aside, accepts all non-conclusory factual allegations as true, and determines whether those non-conclusory factual allegations accepted as true state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 677–684; *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

On a motion for judgment on the pleadings, the court may consider documents relied on in a complaint without converting the motion to one for summary judgment. *Lee v. City of L.A.*,

250 F.3d 668, 688-89 (9th Cir. 2001). A court may consider evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the Fed. R. Civ. P. 12(b)(6) motion. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may treat such a document as “part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.2003). See *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998)(Even if the plaintiff’s complaint does not explicitly refer to documents, if plaintiffs predicate their claims on those documents, defendants may rely on them). Further, pursuant to Fed. R. Evid. 201, a court may take judicial notice of “matters of public record” without converting a motion to dismiss into a motion for summary judgment. *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

Statute of Limitations and 42 U.S.C. §1983

42 U.S.C. §1983 provides a cause of action against persons acting under color of state law who have violated rights guaranteed by the Constitution or federal statutes. *Wilder v. Virginia Hosp. Ass’n.*, 496 U.S. 498 (1990). To state a § 1983 claim, a plaintiff must allege conduct that violated his constitutional rights was “under color of state law.” *Lopez v. Dept. of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991)

Fed. R. Civ. P. 12(b)(6) is the appropriate mechanism by which to dispose of a case on statute of limitations grounds. Such a defense may serve as a basis for dismissal under Rule 12(b)(6) when the time alleged in the complaint shows that the action was not brought within the statutory period. A claim may be dismissed for failing to state a claim on the ground that it is barred by the applicable statute of limitations only when “the running of the statute is apparent

1 on the face of the complaint.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d
2 954, 969 (9th Cir. 2010); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006).

3 Federal courts apply state statutes of limitations for personal injury actions in evaluating
4 claims brought under 42 U.S.C. § 1983. See *Wallace v. Kato*, 549 U.S. 384, 387 (2007);
5 *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1041 (9th Cir. 2011). State law
6 governs not only the length of the limitations period, but also issues of tolling. *Wilson v. Garcia*,
7 471 U.S. 261, 269 (1985). The statute of limitations for personal injury actions in Washington is
8 three years. RCW 4.16.080; *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir.
9 1991).

10 To determine when a statute of limitations period begins to run, the court must look to
11 federal law to see “when a claim accrues.” *Johnson v. California*, 207 F.3d 650, 653 (9th Cir.
12 2000). Under federal law, a claim accrues when the plaintiff knows or should have known of the
13 injury. *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001); *RK Ventures, Inc. v. City of Seattle*,
14 307 F.3d 1045, 1058 (9th Cir. 2002). Accrual is the date on which the statute of limitations
15 begins to run; under federal law, a claim accrues when the plaintiff knows or has reason to know
16 of the injury which is the basis of the action. *Lukovsky v. City and County of San Francisco*, 535
17 F.3d 1044, 1048 (9th Cir. 2008). Once a person has notice or information sufficient to put a
18 reasonable person on inquiry, the limitations period begins to run. *Braxton–Secret v. A. Robins*
19 *Co.*, 769 F.2d 528, 530 (9th Cir.1985)

20 Claims arising out of police actions toward a criminal suspect, such as arrest,
21 interrogation, or search and seizure, are presumed to have accrued when the actions actually
22 occur. See *Kreines v. United States*, 959 F.2d 834, 836 (9th Cir. 1992). Claims for false arrest
23 or illegal search and seizure are discrete and complete upon occurrence and are deemed to have
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1 accrued when the wrongful act occurs. *Venegas v. Wagner*, 704 F.2d 1144, 1146 (9th Cir. 1983).
2 Claims for false arrest accrue on the date of the alleged wrongful arrest. *Davis v. Harvey*, 789
3 F.2d 1332, 1333 n. 1 (9th Cir. 1986); see also *Pearce v. Romeo*, 299 Fed. Appx. 653, 655 (9th
4 Cir. 2008) (An injury from an illegal search and seizure accrues when the act occurs).

5 The instant Complaint was filed on December 1, 2014. In order to be within the three
6 year statute of limitations, Plaintiffs' 42 U. S. C. § 1983 claims must have accrued after
7 December 1, 2011. Here, the Complaint alleges unconstitutional searches, seizures, and arrests
8 occurring in 2008 and 2009. These events occurred well outside the applicable statute of
9 limitations. Plaintiff DeBray's cause of action for retaliatory and wrongful discharge in violation
10 of 42 U.S.C. § 1983 is also subject to the running of the statute of limitations as the Complaint
11 makes it is clear DeBray had knowledge of his alleged injuries and who inflicted those alleged
12 injuries in August 2009.

13 This does not necessarily end the analysis, as Plaintiff's argue that equitable tolling is
14 appropriate. See Dkt. 42 at 9-12. When on the face of a complaint an action is barred by the
15 statute of limitations, the burden of alleging facts which would give rise to tolling falls upon the
16 plaintiff. *Hinton v. Pac. Enters.*, 5 F.3d 391, 395 (9th Cir. 1993).

17 The Complaint alleges that Plaintiffs did not have "salient factual information" relevant
18 to their claims until "early 2013" because of "Defendants' well-coordinated and wrongful
19 conduct" constituting a cover up of the constitutional violations against Plaintiffs. Dkt. 1 at 6-7.
20 Plaintiffs assert that that they did not have the requisite knowledge of these violations to their
21 rights to bring legal action until January of 2013 when Superior Court Judge Verser entered the
22 suppression ruling. Dkt. 42 at 11-12. Plaintiffs also argue that the statute of limitations should
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1 be tolled because Defendants' conduct consisted of a continuing violation of their rights. Dkt. 42
2 at 12-15.

3 Equitable tolling is a remedy that permits a court to allow an action to proceed when
4 justice requires, even though the statutory time period has elapsed. *State v. McLean*, 150 Wn.2d
5 583, 591, 80 P.3d 587 (2003). The predicates to equitable tolling are bad faith, deception, or
6 false assurances by the defendant and the exercise of diligence by the plaintiff. *In re Bonds*, 165
7 Wn.2d 135, 141 (2008); *Benyaminov v. City of Bellevue*, 144 Wn.App. 755, 760-61 (2008).
8 Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a
9 garden variety claim of excusable neglect. *Benyaminov*, at 761. Where equitable tolling applies,
10 the statute of limitations only tolls until the plaintiff learns, or through due diligence should have
11 learned, the facts the defendant has concealed. *Finkelstein v. Sec. Prop., Inc.*, 76 Wn.App. 740
12 (1995).

13 Even in the event Plaintiffs could establish that Defendants' conduct warranted the
14 application of equitable tolling the statute of limitations would only be tolled until Plaintiffs
15 learned, or through due diligence should have learned, the facts the Defendants concealed.
16 These "concealed" facts were known to Plaintiffs, or should have been known, on October of
17 2011, when Plaintiffs obtained a copy of the Investigative Report into OPNET, or at the latest
18 November 14, 2011, when the Plaintiffs' filed the motion to suppress. These events occurred
19 more than three years prior to the filing of the Complaint and as such do not save the federal
20 claims from being barred by the statute of limitations.

21 Additionally, Plaintiffs allege that "continuing violations of constitutional rights" applies
22 to Defendants' conduct as an exception to the rule that the statute of limitations is triggered when
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1 the act about which a plaintiff complains occurs. Dkt. 42 at 12-15. The Court finds these
2 arguments to be without merit.

3 First, the Supreme Court has held that the statute of limitations runs separately from each
4 discrete act. Discrete acts are not actionable if time barred, even when they are related to acts
5 alleged in timely filed charges. *AMTRAK v. Morgan*, 536 U.S. 101, 128 (2002). See also
6 *Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara*, 344 F.3d 822, 829 (9th Cir. 2003).

7 Here, each of Plaintiff's claims of termination, seizure, or arrest was discrete and
8 independently actionable well over three years ago. See e.g., *Venegas v. Wagner*, 704 F.2d
9 1144, 1146 (9th Cir. 1983)(Where false arrest or illegal search and seizure is alleged, the conduct
10 and asserted injury are discrete and complete upon occurrence, and the cause of action can
11 reasonably be deemed to have accrued when the wrongful act occurs). Plaintiffs cannot establish
12 liability for events occurring more than three years before the filing of this Complaint under a
13 continuing violation theory. See *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061 (9th
14 Cir. 2002); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir. 2004).

15 Further, Plaintiffs have submitted no evidence specific to the Defendants showing their
16 actions constituted a "continuing violation." In the Ninth Circuit, a "continuing violation is
17 occasioned by continual unlawful acts, not by continual ill effects from an original violation."
18 *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981). Application of the continuing violation
19 doctrine requires "repeated instances or continuing acts of the same nature, as for instance,
20 repeated acts of sexual harassment or repeated discriminatory employment practices." *Sisseton–*
21 *Wahpeton Sioux Tribe of Lake Traverse Indian Reservation*, 895 F.2d 588, 597 (1990). Here the
22 actions which constituted the alleged violations of constitutional rights all occurred well over
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1 three years prior to the filing of the Complaint. Plaintiffs' federal claims are barred by the statute
2 of limitations.

3 **Plaintiff Ted DeBray's Federal Claims**

4 Plaintiff DeBray alleges a cause of action for retaliatory and wrongful discharge in
5 violation of 42 U.S.C. § 1983. Dkt. 1 at 24-25. In support of his claim, Mr. DeBray alleges
6 Jefferson County and Jefferson County Prosecuting Attorney Juelanne Dalzell forced him to
7 resign for attempting to provide court ordered exculpatory evidence for in-camera review. *Id.*
8 DeBray's alleged forced resignation occurred on August 31, 2009. Dkt. 1 at 11.

9 It is evident from the Complaint that DeBray had knowledge of his alleged injuries and
10 who inflicted those alleged injuries at the time the incidents, August 31, 2009. DeBray's claim is
11 time barred. Even were the Court to consider Plaintiff's argument that the claim did not accrue
12 until DeBray had knowledge of the purported wrongdoing of the Defendants, this information
13 was available no later than November 14, 2011, and the claim is nonetheless barred by the statute
14 of limitations.

15 **Plaintiff Gary Corman's Federal Claims**

16 Plaintiff Corman alleges the following claims under 42 U.S.C. § 1983: (1) violation of
17 the Fourth Amendment, (2) malicious prosecution- Fifth and Fourteenth Amendments, and (3)
18 violation of his due process rights. Dkt. 1 at 25-29. In support of his Fourth Amendment claim,
19 Mr. Corman makes the following allegations: a GPS was attached to his car without a warrant
20 from October 15, 2008 to October
21 31, 2008; a thermal search of his home was conducted pursuant to a warrant on October 29,
22 2008; a search of his home was conducted on October 31, 2008; and he was arrested on October
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1 31, 2008, charged with manufacturing marijuana, and released on his own recognizance on
2 November 3, 2008. Dkt. 1 at 8-9.

3 As previously noted, any claim for unlawful search, seizure, or arrest under the Fourth
4 Amendment accrues on the date the alleged wrongful act occurs. All of the purported acts
5 occurred beyond three years of the filing of the Complaint and the Fourth Amendment claims are
6 barred by the statute of limitations. Even were the Court to consider a later date, it is evident
7 from the Complaint that Corman was at the very least aware of the facts alleged in the Complaint
8 no later than November 14, 2011. The causes of action remain barred by the three year statute of
9 limitation.

10 Corman alleges a malicious prosecution claim under the Fourth, Fifth and Fourteenth
11 Amendments. Dkt. 1 at 28-29. With regard to the Fourteenth Amendment, there is no
12 substantive right under the Due Process Clause to be free from criminal arrest or prosecution
13 without probable cause. *Albright v. Oliver*, 510 U.S. 266, 268 (1994) (plurality). Corman fails
14 to state a malicious prosecution claim premised on the Fourteenth Amendment. With regard to
15 the Fifth Amendment, the Supreme Court has stated that the Fifth Amendment “may not furnish
16 the constitutional peg on which to hang... [the] tort [of malicious prosecution].” *Id.* at 270 n.4.
17 Further, the Ninth Circuit has plainly held that the Due Process Clause of the Fifth Amendment
18 applies only to actions of the federal government—not to those of state or local governments.
19 *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001). Corman fails to state a malicious
20 prosecution claim premised on the Fifth Amendment.

21 The Complaint fails to allege facts that would support a Fourth Amendment claim for
22 malicious prosecution. All of Mr. Corman’s allegations with respect to the purported Fourth
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1 Amendment violation occurred prior to his arraignment and do not support a claim of malicious
2 prosecution.

3 Even assuming Corman could state a claim for malicious prosecution under § 1983, the
4 claim is barred by the statute of limitations. A malicious prosecution claim under § 1983
5 stemming from a criminal charge accrues upon termination of the criminal proceeding in
6 plaintiff's favor. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1060 n.11 (9th Cir. 2002).
7 The criminal action was dismissed on August 31, 2009. Dkt. 1 at 11. The three year statute of
8 limitations ran on August 31, 2012, and the cause of action is barred.

9 To the extent Corman alleges a due process claim under the Fifth and Fourteenth
10 Amendments, the 'factual' assertions that Corman makes in support of this claim are the same as
11 those in support of his Fourth Amendment claim. See Dkt. 1 at 28. A constitutional claim that is
12 covered by a specific constitutional provision, such as the Fourth Amendment, must be analyzed
13 under that specific provision rather than the rubric of due process. *Graham v. Connor*, 490 U.S.
14 386, 394 (1989). Corman's due process claim rests on the same allegedly wrongful search,
15 seizure, and arrest on which his Fourth Amendment Claim is premised. Thus, Corman cannot
16 maintain a separate due process claim under the Fifth or Fourteenth Amendment.

17 Further, due process is violated the moment the harm occurs and accordingly the statute
18 of limitations on a due process claim begins to accrue as soon as the government action occurs.
19 *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997). Corman's due process claim arises
20 out of alleged harm that is claimed to have occurred in 2008 and that he was well aware of, at the
21 latest, on November 17, 2011. Thus, the due process claim filed December 1, 2014, more than
22 three years after November 17, 2011, is barred by the statute of limitations.

23 Moreover, a prosecutor is immune from liability under Section 1983 when engaging in
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activities intimately associated with the judicial phase of the criminal process. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Prosecutors Dalzell, Kelly, and Nichols' alleged decisions to prosecute are therefore subject to absolute immunity and cannot serve as the basis for § 1983 liability. Nor can Corman maintain a malicious prosecution claim under § 1983 cannot be maintained against the Prosecutors for civil *in rem* forfeiture proceedings. See *Paskaly v. Seale*, 506 F.2d 1209, 1212 (9th Cir. 1974).

Plaintiff Steven Fager's Federal Claims

Plaintiff Steven Fager alleges the following claims under 42 U.S.C. §1983: (1) violation of the Fourth Amendment, (2) malicious prosecution - Fifth and Fourteenth Amendments, and (3) violation of his due process rights. Dkt. 1 at 21-29. Fager alleges the following in support of his Fourth Amendment claim: a thermal image search performed on his home in September 2008 without a warrant; the execution of a thermal imaging search warrant for 115 Freeman Lane on September 24, 2009; the execution of a search warrant for 115 Freeman Lane on October 8, 2009; the execution of a search warrant for 11 Glendale Drive on October 8, 2009; his arrest on October 8, 2009 (*id.*); the seizure of Mr. Steven Fager's property on October 8, 2009; and that Judge Verser granted a motion to suppress the evidence obtained in these searches. Dkt. 1 at 8-14.

As evident in the Complaint, Fager had knowledge of the critical facts of his alleged injuries caused by the alleged constitutional violations, and who inflicted those alleged injuries, as of the time of the incidents about which he is complaining; i.e. 2008 and 2009. The statute of limitations ran on Fager's Fourth Amendment claim long before the Complaint was filed.

Alternatively, Fager had knowledge of the critical facts of his alleged injuries at least by November 14, 2011, when he filed a motion to suppress evidence. Again, Fager did not file the

1 instant Complaint until more than three years had expired. The Fourth Amendment claim is
2 barred.

3 The ‘factual’ assertions Fager makes in support of his malicious prosecution claim that
4 criminal and civil actions were initiated against him without probable cause are the same as those
5 he makes in his stand-alone Fourth Amendment Claim under § 1983. See Dkt. 1 at 28-29. For
6 the same reasons as regards to Defendant Corman, Fager cannot maintain a claim for malicious
7 prosecution. Additionally, Fager has not pleaded sufficient facts to show that there was a
8 favorable termination of the prosecution against him. Dismissal of charges due to the
9 exclusionary rule does not qualify as a favorable termination for the purpose of malicious
10 prosecution. See *Pattiz v. Minye*, 61 Cal.App.4th 822, 826 (1998); *Brin v. Stutzman*, 89 WnApp.
11 809, n.2 (1998).

12 Moreover, Prosecutors Dalzell, Kelly, and Nichols’ alleged decisions to prosecute are
13 subject to absolute immunity and cannot serve as the basis for § 1983 liability. Additionally, a
14 malicious prosecution claim under § 1983 cannot be maintained against the Prosecutors for civil
15 *in rem* forfeiture proceedings.

16 Fager’s due process claims are subject to dismissal on the same basis as those of Plaintiff
17 Corman. Fager cannot bring separate Fifth and Fourteenth Amendment claims based on
18 allegedly wrongful search, seizure, and arrest that made up the basis for a Fourth Amendment
19 claim. Further, any such claim is barred by the statute of limitations.

20 **Plaintiff Timothy Fager’s Federal Claims**

21 Plaintiff Timothy Fager, asserts the following federal claims under 42 U.S.C. § 1983: (1)
22 violation of the Fourth Amendment, (2) malicious prosecution– Fifth and Fourteenth
23 Amendments, and (3) violation of his due process rights. Dkt. 1 at 21-29. Mr. Timothy Fager’s
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1 Fourth Amendment claims are premised on the following allegations: the execution of a thermal
2 imaging search warrant for 115 Freeman Lane on September 24, 2009; the execution of a search
3 warrant for 115 Freeman Lane on October 8, 2009; the execution of a search warrant for
4 Timothy Fager's home (91 Blaze Trail) on October 8, 2009 and the seizure of personal property
5 during the execution of the warrant; the arrest of Mr. Timothy Fager on October 8, 2009 and
6 subsequent release on October 9, 2009. Dkt. 1 at 11-12.

7 The analysis is the same for Timothy Fager as is that for his brother, Steven Fager, and
8 Corman. The causes of action for violation of the Fourth Amendment, Fifth Amendment,
9 Fourteenth Amendment, and due process are time-barred. See *Id.*

10 **Plaintiff Cynthia Fager's Federal Claims**

11 Plaintiff Cynthia Fager asserts the following federal claims under 42 U.S.C. § 1983: (1)
12 violation of the Fourth Amendment, (2) malicious prosecution – Fifth and Fourteenth
13 Amendments, and (3) violation of his due process rights. Dkt. 1 at pp. 21-29. Cynthia Ms. Fager
14 alleges the following in support of her Fourth Amendment claims: a search warrant was executed
15 for her home at 91 Blaze Trail an October 8, 2009, and she was interrogated at her work by fully-
16 armed officers in SWAT gear. Dkt. 1 at 12.

17 For the same reasons as set forth previously in regards to the other Defendants, Cynthia
18 Fager's federal claims are subject to dismissal. The statute of limitations has run on her claims.
19 She was not subject to prosecution and cannot maintain a malicious prosecution claim under 42
20 U.S.C. §1983. See *Id.* Nor is she entitled to maintain a malicious prosecution claim under §
21 1983 for civil in rem forfeiture proceedings. See *Id.*

Plaintiff Kathleen Wheller's Federal Claims

Plaintiff Wheller asserts the following federal claims under 42 U.S.C. § 1983: (1) violation of the Fourth Amendment, (2) malicious prosecution, and (3) violation of her due process rights. Dkt. 1 at 21-29. Wheller alleges the following in support of her Fourth Amendment claim: a search warrant for her person and home (2449 Port Williams Road) was executed on October 9, 2009; while the search was being conducted, she was placed under arrest, questioned, and then released an hour later; she was not criminally prosecuted; she was provided a copy of the search warrant without an affidavit of probable cause; and a copy of the search warrant was filed with the court seven days after the search without an affidavit of probable cause Dkt. 1 at 17-19.

For the same reasons applicable to Plaintiffs Fagers and Corman, Plaintiff Wheller's Fourth Amendment, Fifth Amendment, Fourteenth Amendment, and due process claims are time-barred. See *Id.* Wheller cannot maintain a malicious prosecution claim under § 1983 for civil in rem forfeiture proceedings. *Id.*; *Paskaly*, 506 F.2d at 1212. She was not criminally prosecuted and for that reason alone her claim for malicious prosecution under § 1983 must be dismissed.

State Law Claims

Under 28 U.S.C. § 1367, a federal court may assume supplemental jurisdiction over all other claims that are so related to claims in the action within the original jurisdiction so that they form part of the same case or controversy. The Court may decline to exercise this supplemental jurisdiction if (1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction,

1 or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
2 28 U.S.C. § 1367(c). Here, the Court has dismissed all federal claims over which it has original
3 jurisdiction and only state law claims remain. This matter is in the early stages of litigation and
4 any remaining claims would involve the interpretation of state law, with no complicating federal
5 questions. The Court will decline to exercise supplemental jurisdiction.

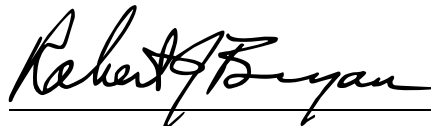
6 **Conclusion**

7 Plaintiffs' federal claims are barred by the applicable statute of limitations, and/or fail to
8 state a claim for relief. For these reasons, all Defendants are entitled to dismissal of all federal
9 claims of the Plaintiffs. Any attempted amendment of the Complaint would be futile. The Court
10 will decline pendent jurisdiction over the remaining state law claims.

11 Therefore, it is hereby **ORDERED**:

- 12 1. Defendants' motions to dismiss pursuant to Rules 12(b)(6) (Dkts. 13, 14, 16, and 18)
13 are **GRANTED** and Plaintiffs' federal claims in their entirety are **DISMISSED**
14 **WITH PREJUDICE**.
- 15 2. The Court declines to exercise supplemental jurisdiction over the state law claims and
16 they are **DISMISSED WITHOUT PREJUDICE** to refile in state court.

17 Dated this 30th day of January, 2015.

18 

19 ROBERT J. BRYAN
20 United States District Judge
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